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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-922

MARY LOUISE GREEN PASCHALL, ET AL.,
Appellants,

VERSUS

CHRISTIE-STEWART, INC., ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE
STATE OF OKLAHOMA

BRIEF OF APPELLANTS

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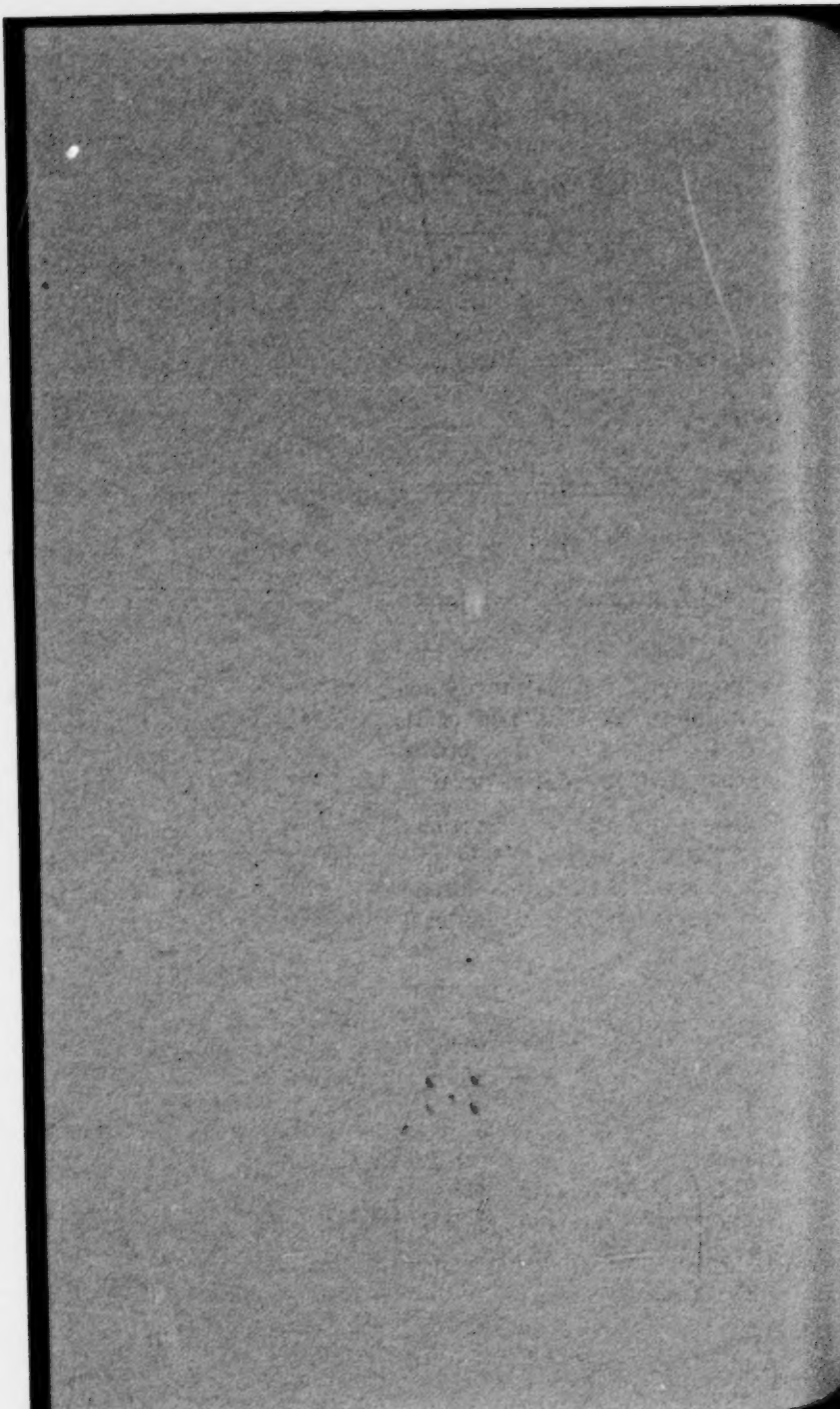

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In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-922

MARY LOUISE GREEN PASCHALL, JAN PASCHAL HARDEN, JOHN N. PASCHALL, JR., THE FOURTH NATIONAL BANK AND TRUST COMPANY OF TULSA, OKLAHOMA, as Executor of the Estate of H. Grady Ross, Deceased, and ZELDA DANNA PASCHALL,

Appellants,

VERSUS

CHRISTIE-STEWART, INC., a corporation, R. W. GARRETT and R. H. VAUGHN,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF APPELLANTS

THE OPINIONS BELOW

The Opinion of the Oklahoma Supreme Court is reported as *Christie-Stewart, Inc.* v. *Walter B. Paschall, Jr., et al.*, 502 P.2d 1265. It also appears at page i of the Jurisdictional Statement filed herein. The Opinion of the Oklahoma Court of Appeals, Division No. 2, was not reported,

but it appears at page vii of the Jurisdictional Statement filed herein. In addition, the trial court journal entry of judgment appears at page xv of the Jurisdictional Statement.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. §1257(2).

This is an appeal from a decision of the Supreme Court of Oklahoma reversing a judgment of the Court of Appeals, Division No. 2, of the State of Oklahoma and affirming the judgment of the trial court that a Resale Tax Deed executed in 1956 by Seminole County, Oklahoma officials was valid and conveyed to Appellees Garrett and Vaughn, the full fee simple title to forty acres of land, including the severed mineral rights separately owned of record by the predecessors in interest of Appellants. The tax sale was conducted under the procedures established in 68 Okla. Stat. 1951 §381, *et seq.* then in effect, and Appellants here challenge, and have challenged throughout the proceedings of this case, the adequacy of the notice of such tax sale as required by such statute to be given to Appellants or their predecessors in interest as owners of previously severed mineral rights, consistent with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Oklahoma handed down its Opinion on September 26, 1972. The Notice of Appeal to this Court was filed by Appellants with the Clerk of the Supreme Court of Oklahoma on December 8, 1972.

With respect to Appellant's challenge of the validity of the above mentioned state statute in relation to the notice requirements thereof, on the ground that as applied to the taking of their mineral rights under the Resale Tax Deed such state statute is repugnant to the Constitution of the United States, the decision of the highest court of the state was in favor of its validity.

Probable jurisdiction was noted here on April 2, 1973.

STATUTES

Because of the interrelationship between the "Original Sale" and the "Resale" under Oklahoma statutory law and decisions, we quote below the notice provisions of the tax sale statutes for both stages of the procedure, although the judgment appealed from applies only to a Resale Deed:

68 Okla. Stat. 1951 §382
(Original Sale)

"The treasurer shall give notice of the sale of real property for delinquent taxes by publication thereof once a week for three consecutive weeks, commencing after the first day of October, preceding the sale, in some newspaper in the county, to be designated by the board of county commissioners, and if the board of county commissioners shall fail to designate such paper, then in a paper to be selected by the treasurer. Such notice shall contain a notification that all lands on which the taxes of such fiscal year remain due and unpaid will be sold, and of the time and place of the sale, and shall contain a list of the lands to be sold and the amount of taxes due. The county treasurer shall charge and collect in addition to the taxes, interest and penalty the sum of twenty-five cents on each tract of real property other than town lots, and ten cents on

each town lot advertised for sale, which sum shall be paid into the county treasury, and the county shall pay the cost of the publication of such notice. But in no case shall the county be liable for more than the amount charged to the delinquent lands for advertising. R.L. 1910, §7397."

68 Okla. Stat. 1951 §432b
(Resale)

"The County Treasurer shall give notice of the resale of such real estate by publication thereof once a week for four consecutive weeks preceding such sale, in some newspaper, having been continuously published one hundred four (104) consecutive weeks with admission to the United States Mails as second class mail matter, with paid circulation and published in the county where delivered in the mails in the county to be designated by the Treasurer; and if there be no paper published in the county, or publication is refused, he shall give notice by written or printed notice posted on the door of the courthouse. Such notice shall contain a description of the real estate to be sold, the name of the owner of said real estate as shown by the last tax rolls in the office of the County Treasurer, the time and place of sale, a statement of the date on which said real estate was sold to the county for delinquent taxes, the year or years for which taxes have been assessed but remain unpaid, and that the same has not been redeemed for the period of two years from the date of sale, the total amount of all delinquent taxes, costs, penalties and interest accrued, due, and unpaid on the same, and that such real estate will be sold to the highest bidder for cash. It shall not be necessary to set forth the amount of taxes, penalties, interest and costs accrued each year separately, but it shall be sufficient to publish the total amount of all due and un-

paid taxes, penalties, interest and costs. Laws 1939, p. 546, §3; Laws 1941, p. 338, §1."

STATEMENT OF QUESTIONS

1. Whether the notice requirements of the tax sale statutes of the State of Oklahoma in effect at the time of the purported taking of the mineral rights of Appellants here under consideration (68 Okla. Stat. 1951, §381, *et seq.*) were repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, the decision of the Supreme Court of Oklahoma being in favor of validity of such state statutes.

2. Whether adequate notice of an Original Tax Sale and a Tax Resale was given Appellants or their predecessors as owners of previously severed mineral rights under lands in the State of Oklahoma, consistent with the Fourteenth Amendment to the Constitution of the United States, the decision of the Supreme Court of Oklahoma being that notice given was adequate.

STATEMENT OF THE CASE

At the times here involved, John N. Paschall and Walter B. Paschall, Jr., were the record owners in equal shares of undivided 15/16 mineral rights and H. Grady Ross owned the other undivided 1/16 mineral rights under the SW/4 NW/4 of Section 29-9N-7E, Seminole County, Oklahoma. Their muniments of title were recorded in various County offices in the Seminole County Court House. The surface was separately owned and the above named mineral owners had no interest in the surface. Appellants are successors in interest to such mineral owners.

The surface owner failed to pay the ad valorem taxes for the year 1952, and the County Treasurer included the land in the Original Sale on the first Monday of November, 1953. For a detailed analysis of Oklahoma tax sale procedures, see "Tax Sales and the Constitution," 20 Okla. L.R. 365. Publication notice thereof was given in accordance with the applicable statute (68 Okla. Stat. §382), none of the owners of interests in the land being named therein. No personal notice to the above named mineral owners was served upon them nor was there posting of notice on the land or elsewhere or mailing of notice to such mineral owners. The statutes did not require any such notice other than publication in the manner actually conducted. Seminole County became the purchaser at such Original Sale.

The land remained unredeemed, and after two years as prescribed by statute, was included in the Resale conducted on the second Monday in May, 1956. Notice of the Resale was given by publication in accordance with the applicable statute (68 Okla. Stat. §432b), only the surface owner being named therein. No personal notice to the above named mineral owners was served upon them nor was there posting of notice on the land or elsewhere or mailing of notice to such mineral owners. The statutes did not require any such notice other than publication in the manner actually conducted. At such Resale, Otis Garrett was the successful bidder and the Resale Deed was made out to R. W. Garrett and R. H. Vaughn (Appellees), who now claim the entire interest in the land including all the mineral rights.

A certified transcript of all the above mentioned tax sale proceedings on file in the office of the County Treasurer has been admitted in evidence in this case. The parties have stipulated that the above named mineral owners received no actual notice of either the Original Sale or the Resale. Walter B. Paschall, Jr., died testate in the year 1965, and John N. Paschall died testate in the year 1966, and their respective devisees have been substituted as parties Appellant. H. Grady Ross died testate in the year 1971, and the Executor of his estate has been substituted as a party Appellant.

In the year 1963, Christie-Stewart, Inc., Appellee, purchased an oil and gas lease from Mr. Garrett and Mr. Vaughn. Later, a separate lease was purchased by the same lessee from Walter B. Paschall, Jr., and John N. Paschall, and another from H. Grady Ross. Mr. Vaughn testified that no other lease had been previously executed by the tax sale purchasers, that they had conducted no previous exploration for oil, gas, or other minerals on the land, and that no production had been established in the interim between the tax sales of 1953-1956 and the leasing to Christie-Stewart, Inc. In order to determine that they had valid leasehold coverage prior to drilling a well on the land, Christie-Stewart, Inc., filed this action and an order of the trial court was thereafter entered quieting the oil and gas leasehold title in that corporation but reserving for future consideration the question of which set of claimants had title to the mineral rights and, consequently, which oil and gas lease was valid and which was void.

A well was drilled by Christie-Stewart, Inc., in 1965, and production was established which has continued to the present time. Royalties have been suspended by the purchaser of the production pending determination of the ownership of the mineral rights, *i.e.*, as between Mr. Garrett and Mr. Vaughn on the one hand and the Paschall devisees and the Estate of Mr. Ross on the other. It is this question that the District Court of Seminole County, Oklahoma, was asked to decide and this turns on the validity of the taking of the mineral rights under the Original Sale of 1953 and the Resale of 1956. The trial court entered its Judgment on November 3, 1969, that the Resale Tax Deed of 1956 was valid and conveyed the full fee simple title including the mineral rights here in dispute (Jurisdictional Statement p. xv).

It is the position of the Paschall devisees and the Ross Estate, and has been since the inception of this litigation, that the tax sale proceedings in both the Original Sale of 1953 and the Resale of 1956 failed to include the essential element of constitutional notice to the then owners of the mineral rights, a separate and severed property interest. Such property owners were thereby denied due process of law, and therefore the purported taking of their property was void *ab initio*.

The federal questions stated above were raised in the trial court by Amendment to Answer filed by Appellants, and argued and briefed in the trial court (Transcript of Trial Court Proceedings, pages 18 and 19) and adversely ruled upon by the trial court. These federal questions were thereafter the basis of the appeal Brief of Plaintiffs in

Error and decided in favor of Appellants by the Oklahoma Court of Appeals, Division No. 2, the opinion (Jurisdictional Statement p. vii) dealing specifically with such questions. Thereafter, the Supreme Court of Oklahoma again reviewed the case and reversed the judgment of the Oklahoma Court of Appeals on the specific federal questions stated above, affirming the judgment of the trial court (Jurisdictional Statement p. i).

BRIEF AND ARGUMENT

Summary

The real estate tax statutes of Oklahoma require that before a Resale, a notice shall be published containing the name of the owner of the real estate. The Supreme Court of Oklahoma has previously held that such a requirement with respect to a Certificate Tax Deed, as distinguished from a Resale Deed, makes mandatory the naming of the separate mineral owners in the published notice or the mineral rights are not effectively taken by the tax sale. Appellants' predecessors in interest were owners of severed mineral interests and were not named in the published notice with respect to the Original Sale or the Resale. Thus, the notice requirements of the Oklahoma tax sale statute itself were not followed.

However, even if such statutory requirements were sufficiently followed, the notice required by the statute is not adequate under the Fourteenth Amendment to the United States Constitution. Prior decisions of the United States Supreme Court held that publication notice is not sufficient when more efficient means of notification are

available. When the acting entity has on its books the names and addresses of the property owners, to whom notice of the impending action could be mailed, publication notice is not adequate. Here, such names and addresses were readily available in the same court house. Consequently, published notice in a local newspaper, not containing the names of the severed mineral interest owners, was not adequate under the Constitution.

PROPOSITION I

NO STATUTORILY ADEQUATE NOTICE OF THE ORIGINAL TAX SALE AND OF THE TAX RESALE WAS GIVEN APPELLANTS' PREDECESSORS, AS OWNERS OF PREVIOUSLY SEVERED MINERAL RIGHTS.

The statutes applicable to the Original Sale and Resale here under consideration were 68 Okla. Stat. 1951, §381, *et seq.*, of which §382 and §432b are quoted above. These statutes establish a purely administrative procedure by the county officials to enforce tax liens. No judicial procedure is involved. For the Original Sale in 1953, the Oklahoma statutes required the County Treasurer to advertise for three weeks in the county where the land lies, with a description of the lands to be sold and the amount due on each tract. Neither personal notification to the owner, nor posting, nor mailing to the last known address was required, and in fact the name of the owner of the land was not required to be shown in the published notice of sale.

In this case, the Original Sale of 1953 was conducted after publication notice only, and in that notice no owners' names were shown. It was stipulated that neither Appellants nor their predecessors in interest, the mineral own-

ers, had actual notice of the sale. Seminole County became the purchaser at the Original Sale by reason of absence of an adequate bid by the public.

For the Resale of 1956, the Oklahoma statutes required that if the land remained unredeemed or unsold to a certificate holder after two years, the County Treasurer must advertise for four weeks in the county where the land lies, describing the land and showing the name of the owner. There was no requirement for personal service on the owner or mailing to him.

In this case, the Resale of 1956 was conducted after publication notice only, and only the surface owner was named in the advertisement, not Appellants or their predecessors in interest, the mineral owners. It was stipulated that neither Appellants nor their predecessors in interest, the mineral owners, had actual notice of the Resale.

It is the testimony in this case that the tax sale purchasers at the Resale of 1956 (Appellees Garrett and Vaughn) filed their deed and took possession of the surface of the land through a tenant, but they made no attempt to take possession of the minerals thereunder either by executing a lease or physically exploring for minerals under the land. This was the status until Christie-Stewart, Inc., prevailed upon them to execute the oil and gas lease of 1963. Thereafter, Christie-Stewart, Inc., also obtained an oil and gas lease from the Paschalls and Mr. Ross, Appellants' predecessors, and this action was filed in 1965. It cannot be argued therefore that any possession of the minerals was obtained by the tax title claimants prior to this case

coming to issue, since only the surface owner's name was included in the Resale publication notice and only the surface was actually possessed thereafter by the tax sale claimants.

We call the Court's attention to the case of *Walker* v. *Hoffman*, 405 P.2d 57 (Okla. 1965). The case involved the question of whether a severed mineral interest owner was deprived of his property by a Certificate Tax Deed issued after an Original Sale. A Resale was not involved, but like the Resale procedure the statute concerning the issuance of the Certificate Tax Deed (68 Okla. Stat. 1961, §451) required notice to the "owners" of the land. The Supreme Court of Oklahoma held that the defendant, who owned only a severed mineral interest at the time of the tax sale, was an "owner" as contemplated by the statute and entitled to notice. Having failed to give such owner notice, the procedure resulting in the Certificate Tax Deed could not divest the mineral owner's title. Possession of the surface for the period of limitations did not preclude the mineral owner from asserting his title. Thus, title to the previously severed mineral interest was quieted in the defendant.

The statutory procedure for a Resale, 68 Okla. Stat. 1951, §432b, which was applicable in 1956, required that the notice published prior to the Resale "shall contain . . . the name of the owner of said real estate. . . ." This is substantially the same requirement with respect to which the Supreme Court of Oklahoma held in the above cited *Walker* v. *Hoffman* case that the severed mineral rights were not taken, *i.e.*, notice to the surface owner was not

notice to a severed mineral interest owner. Here, the Paschalls and Mr. Ross were not informed directly, and the only notice required by the statute, notice to "the owner" by publication, made no attempt to include them by naming them. Their names and whereabouts were easily ascertainable from the Seminole County records in the same court house as the office of the County Treasurer, as shown by the pleadings in this case. In this regard, it is interesting that the Appellee oil company, Christie-Stewart, Inc., found all parties when they desired to purchase oil and gas leases. Consequently, it is obvious that the very statutory procedure required for the efficacy of the tax sale was not sufficiently followed to take the severed mineral rights.

The Oklahoma Supreme Court in its opinion in this case has differentiated between notice required to be given "owners" in Certificate Tax Deed situations as in the *Walker* v. *Hoffman* case, and to be given "owners" in the Resale situation here. The reasoning fails to consider whether under the Constitution a valid differentiation can be made between the notice requirements of the two statutory levels of tax sales. In both instances, the county is the acting entity seeking to collect taxes, and the same property owner is being subjected to deprivation of his property. Is it constitutionally sound to hold that individual notice at one level is necessary while general notice at another level is adequate, assuming, as in this case, that no actual or constitutionally-adequate constructive notice has been given to the landowner at any prior level of the tax sale mechanism? Yet, on this very differentiation, the mineral owners in this case have been held by the Oklahoma

Supreme Court to have lost their property while a mineral owner retained his property in the *Walker* v. *Hoffman* case.

As stated in *Backus* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 42 L.Ed. 853, 18 S.Ct. 445 (1898), "An act of the legislature which in terms gave one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws." *Cf. Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U.S. 459, 81 L.Ed. 1223, 57 S.Ct. 838 (1937); and *Morey* v. *Dowd*, 354 U.S. 457, 1 L.Ed.2d 1485, 77 S.Ct. 1344 (1957).

PROPOSITION II

NO CONSTITUTIONALLY ADEQUATE NOTICE OF THE ORIGINAL TAX SALE AND OF THE TAX RESALE WAS GIVEN APPELLANTS' PREDECESSORS, AS OWNERS OF PREVIOUSLY SEVERED MINERAL RIGHTS.

Whether or not the Oklahoma statutory procedure was sufficiently complied with, it is the position of these Appellants, as successors in interest of the severed mineral interest owners prior to the Resale of 1956, that they would be deprived of their property without due process of law if the Resale Deed to Mr. Garrett and Mr. Vaughn is deemed to cover and include the mineral rights. In *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the Supreme Court of the United States held that mere publication notice in a local newspaper was not sufficient notice prior to a determination of property rights when more efficient means of notification are available. In the opinion, Justice Jackson stated:

> ". . . when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

The Opinion describes the distinguishing feature of inadequacy of notice as "not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand."

The *Mullane* case has been followed in several decisions by the United States Supreme Court: *City of New York* v. *NY, NH & H R.R.*, 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953); *Covey* v. *Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956); *Walker* v. *City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956); *Wisconsin E. P. Co.* v. *City of Milwaukee*, 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed.2d 241 (1956); *Schroeder* v. *City of New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255, 89 A.L.R.2d 1398 (1962). That the theory of the *Mullane* case is applicable to tax sales is made clear in the *Covey* v. *Town of Somers* decision cited above, and that it is applicable to administrative procedures, as well as judicial action, is shown by the *Wisconsin E. P. Co.* v. *City of Milwaukee* decision. For a more full treatment of this subject, see "Tax Sales and the Constitution," 20 Okla. L.R. 365.

The *Mullane* opinion language seems particularly applicable to the present case:

> "Against this interest of the State (to be able to determine interests or claims of individuals who are un-

known or outside of the State) we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394, 58 L.Ed. 1363, 1368, 34 S.Ct. 779. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

"In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would."

"As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

"It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of

adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint."

Analyzing the notice requirements of the Oklahoma tax sale procedures in the light of United States Supreme Court cases cited above, especially the facts and language of the *Mullane* case, leads to one inescapable conclusion: Constitutionally adequate notice is not required by the Oklahoma statutes, and in this case was not given, to take the property of severed mineral interest owners where no duty to pay taxes exists. In Oklahoma, real estate taxes are payable exclusively by the surface owner; *In re Indian Territory Ill. Oil Co.* (1914), 142 Pac. 997. The statutes effective at the time of the Original Sale in 1953, here under consideration, required only publication notice containing the description of the lands to be sold and the amount of taxes due, without naming the owner of the land. No posting, mailing, or individual notification of any sort was required. The facts show that no notice was ever brought home to Appellants or their predecessors in interest during the Original Sale procedure and insufficient notice was re-

quired by the statute. At both the Original Sale and the Resale levels, the statutes required only publication notice, and this does not fulfill the requirements of the *Mullane* decision and subsequent cases, because it is not the most efficient method available to apprise the owner, especially the mineral owner, that his property is about to be taken for non-payment of taxes. The mineral owners' names and whereabouts were easily ascertainable from the county's own records.

The rationale of the Supreme Court of Oklahoma in its Opinion in this case (Jurisdictional Statement, p. i) is that whether or not the statute requires notice to the mineral owners, the real estate tax statute itself is sufficient notice to all real property owners that if the taxes are not paid, the land will be sold. The same argument was available to hold the Certificate Tax Deed valid as to the minerals in *Walker* v. *Hoffman, supra,* but it was not given effect. The inconsistency of the Oklahoma Supreme Court between the reasoning in that decision and in this is obvious on that point as well as on the point of whether a severed mineral interest owner is an "owner" entitled to be named in publication notice. This inconsistency is such that a denial of equal protection of the law exists as between different mineral owners, whose rights thus depend upon which tax foreclosure mechanism is used, *i.e.,* a certificate tax sale or a resale.

To hold that a statute gives ample notice of the jeopardy one's property is in, is to assume the validity of the facts upon which the sale is made. Suppose on the contrary that the taxes had been paid and that an administrative

error was responsible for the property's inclusion in the tax sale. Without notice of the proposed sale, there would be no immediate opportunity to controvert the basic premise of the tax sale and if the sale were later discovered, the right to redeem might have expired. It had in the present case before the sale was discovered by Appellants. In fact, Oklahoma law is very severe in this respect: No action to avoid the tax deed may be commenced after one year from the recording of the tax deed; 68 Okla. Stat. 1951, §455 (now §24345). However, possession is also necessary in addition to the recording of the tax deed; *Fickel* v. *Webb*, 293 Pac. 206 (Okla. 1930). In this case, the tax deed purchaser did not take possession of the severed mineral rights of Appellants.

That administrative errors occur occasionally is well known in Oklahoma as in other states and is made vividly (almost humorously) clear by the case of *Ponder* v. *Ebey*, 194 Okla. 407, 152 P.2d 268 (1944). In that case the owner of the land had, on seven separate contacts with the County Treasurer, attempted to pay the ad valorem taxes which were assessed against his property, but by reason of seven successive administrative errors, it was nevertheless included in the tax sale and sold to defendant. The litigation which resulted from these administrative errors concluded favorably to the plaintiff, but the issue was in doubt for more than four years during the expensive judicial procedure necessary to remedy the errors.

The only authority cited by the Oklahoma Supreme Court, in its Opinion in this case, for the proposition that the statute itself gives notice to the property owner that

his property will be sold, is the case of *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692. However, that case does not hold that the state statute itself gives ample notice of the impending taking of property. The question there was simply how much notice is required where the property (an inactive bank account) is presumed abandoned. The decision was merely that posting on the court house door was satisfactory under those circumstances for due process requirements. Furthermore, it should be noted that the case does not involve a change of title to property, but merely a transfer of possession from the bank to the state. Consequently, it does not reach the question of taking property without due process as is here involved.

An argument against the necessity of notice in tax lien foreclosures is found in *Leigh* v. *Green*, 193 U.S. 79, 24 S.Ct. 390, 48 L.Ed. 623 (1904). That case was an historical precedent for the proposition, long adhered to, that the "most summary methods of seizure and sale for the satisfaction of taxes and public dues have been held to be authorized, and not to amount to the taking of property without due process." This was because of the distinction clearly made in the case that the action was *in rem:* "The notice was good as against the world, and all that is necessary when the proceedings are *in rem.*" It is important to note, however, that the United States Supreme Court, in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), specifically rejected the distinction between *in rem* and *in personam* proceedings insofar as it might affect constitutional guaranties: ". . . we think

that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state . . . Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." The language and holding of *Mullane*, when coupled with the subsequent holdings of this Court based thereon, including *Covey* v. *Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956); *Walker* v. *City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178; and *Wisconsin E. P. Co.* v. *City of Milwaukee*, 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed.2d 241 (1956), make clear that after 1950 the taking of title to property through judicial or administrative action, including tax sales, must be attended with much more regard toward notifying the owner of the property that his rights are about to be changed or extinguished or transferred. State legislatures have responded by tightening statutory requirements for notice and state courts have recognized the changed standards in many decisions since *Mullane*. The result is that *Leigh* v. *Green*, and state and federal decisions based upon that view of due process requirements, have been either affirmatively or impliedly overruled; *Walker* v. *City of Hutchinson*, *supra*.

An example of the modern views of fair dealing when government desires administratively to affect rights held

by individuals is the situation of a determination of non-compliance with the requirements of a license and consequent cancellation thereof by the issuing agency. The Administrative Procedure Act, 5 U.S.C.A. §558, forbids *ex parte* action in these words:

> "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements."

The Oklahoma Supreme Court itself has so recognized with respect to judicial procedure, as commanded in *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713, and in its new procedural Rule No. 16 requiring a "diligent and meaningful search of all reasonably available sources" including in cases affecting interests in land, "local assessor's records, local county treasurer's records, local deed records as to the property involved for return address on recorded instruments, and local probate records if applicable." This procedure is now necessary when a private individual seeks to affect property which might be claimed by another. However, in its opinion in this case, the same Court relieves the county from any requirement to check any information source, opining that the tax statute itself is sufficient notice to private landowners. As stated in *Walker* v.

City of Hutchinson, supra, "There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard."

Rather than base its decision here, that the statute gives sufficient notice in the case of tax sales, on the "elusive and confused" distinctions between *in rem* and *in personam* proceedings, the Oklahoma Supreme Court has stated that the statute fixes the exact time and place of sale and further notice is therefore not required. The opinion of the Supreme Court of Oklahoma states that this is a material difference as compared with the facts of the *Mullane* case. A close examination of the *Mullane* opinion, however, will disclose that, on the contrary, generally the same type of statute was involved. The statute provided:

> "10. Not less than twelve nor more than fifteen months after the date on which a common trust fund is established, and triennially thereafter, each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof either in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or in the office of the surrogate of such county and shall within five days thereafter furnish the superintendent with a copy thereof. Upon filing such an account, such trust company shall file therewith a petition for its judicial settlement and shall proceed with such judicial settlement in the supreme court if the account is filed in the office of a clerk of that court or in the surrogate's court if the account is filed in the office of the surrogate. N.Y. Banking Laws §100-c (Ch. 687, L 1937, as amended by Ch. 602 L 1943 and Ch. 158, L 1944)."

it then provided that a general notice of the hearing should be published for four weeks in a newspaper to be designated by the court, without naming the interested parties. Also as required by the statute, the trust company had previously sent each beneficiary a copy of those provisions of the Act relating to the sending of the notice itself and to the judicial settlement of common trust fund accounts. Thus, the beneficiaries of the common trust fund knew statutorily when and where the accounting would be settled. However, the opinion states "Certainly sending (beneficiaries) a copy of the statute months and perhaps years in advance does not answer" the purpose of a "serious effort to inform them personally of the accounting, at least by ordinary mail to the record address" when as in that case and in this, the acting entity "has on its books the names and addresses" of the property owners.

The proposition put forth by the Oklahoma Supreme Court, that the statute itself is adequate notice, was not argued by either side below. That proposition, if validated here, will permit forfeiture without the necessity of a determination of facts. That may be necessary in some situations involving the public health, spoilage, or moveables, although the latter are protected from pre-judgment replevin; *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983. Land, however, is definitely not in that category and delay to protect constitutional rights is not destructive of the county's interests. The Oklahoma Court is saying that the land owner knows whether or not he paid his taxes and if he did not, he has no complaint if the county sells his land. But this assumes the county has made no error in

reaching its determination that the taxes were not paid. How can that determination be controverted or remedied if the owner is not notified of the proposed sale? Many other applications of that proposition could be made by an all-powerful state. Only slight modification or extension of the theory could destroy all civil rights by dispensing with the necessity of a day in court when life, liberty or property is in jeopardy; *Armstrong* v. *Manzo* (involving children), 380 U.S. 545, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965); *Robinson* v. *Hanrahan* (involving jailed persons), 409 U.S. 38, 34 L.Ed.2d 47, 93 S.Ct. — (1972); *Fuentes* v. *Shevin* (involving debtor consumers), *supra* (1972). On that abhorrent theory, all property, all rights, are jeopardized under government by fiat.

CONCLUSION

Since in this case neither constructive notice was effectuated nor actual notice received, due process of law was not carried out as to the rights of the mineral owners. The tax sale, if it is construed as affecting the mineral rights, constituted an attempted taking of the mineral owners' property without due process of law. Accordingly, the tax sale should be declared ineffective as to the severed mineral rights, the judgment below should be reversed, and title to the mineral rights should be quieted in

the devisees of John N. Paschall and Walter B. Paschall, Jr. as to 15/16 interest, and in the Estate of H. Grady Ross as to 1/16 interest.

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May, 1973

CERTIFICATE OF SERVICE

I hereby certify that the following, who are all of the parties required by law to be served in the above case, were this day mailed three copies of the foregoing Brief of Appellants, postage prepaid:

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